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SUNDRA RAJOO

v.

MOHAMED ABD MAJED & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[ORIGINATING SUMMONS NO: D-24NCC(ARB)-13-2010]
23 MARCH 2011

C ***ARBITRATION:*** *Arbitrator - Removal of - Application for - Application for removal of arbitrator by co-arbitrator - Partiality and biasness - Locus standi of applicant/arbitrator - Arbitrator's duty to disclose past and present appointments with claimant - Jurisdiction of court to intervene - Arbitration Act 2005, ss. 8, 14*

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The applicant and the 1st respondent were co-arbitrators in cases A330 and A331 where the claimant was Virgoz Oils & Fats Pte Ltd ('Virgoz') and the respondents were Haryana Oils & Soya Ltd ('Haryana') and Sangrur Agro Ltd ('Sangrur') respectively. Apart from the above, the applicant and the 1st respondent had also been appointed for three other Persatuan Penapis Minyak Sawit Malaysia ('PORAM') arbitrations ('the three arbitrations') where Virgoz and/or the Virgoz group were the respondents. In the three arbitration proceedings, the 1st respondent's appointment was by Virgoz. The 1st respondent was further nominated by Virgoz to sit for over 20 PORAM arbitrations. His participation was perceived as bias and, thus, was objected by the claimant in the three arbitrations. On the basis of the objection, the 1st respondent voluntarily resigned as the co-arbitrator in the three arbitration proceedings. Both Haryana and Sangrur refused to participate in the arbitration proceedings of A330 and A331. Having known the facts of their refusal, the applicant applied to remove the 1st respondent as co-arbitrator from A330 and A331 and/or seek disclosure of his past and present appointments to the arbitral tribunal and to the parties of the arbitration. The 1st respondent refused to disclose information whereas, the 2nd respondent's refusal to do the same was due to the fact that PORAM Rules and the Arbitration Act 2005 ('AA 2005') did not make any provision for bodies such as PORAM to make disclosures on the previous appointments received by arbitrators. The issues were: (i) whether a co-arbitrator had *locus standi* to seek reliefs prayed for despite the fact that such reliefs could be sought

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by the litigants to the arbitration proceedings; and (ii) whether the 1st respondent owed a duty to disclose to another co-arbitrator in view of the partiality and biasness.

Held (allowing part of the application):

[1] Duty of arbitrators to disclose facts likely to be biased is internationally and locally well-established and thus the court has a coercive power to revoke the authority of an arbitrator. The court would not have hesitated to consider this application if it was made by the respondents of the arbitration proceedings, *ie*, Haryana and Sangrur as it would fall clearly within the parameters of AA 2005 and a number of supported case laws. (para 10)

[2] Almost all cases that the appellant relied on did not deal with a challenge taken by a co-arbitrator. The requirement of impartiality was a principle of natural justice and in consequence, the court had an inherent jurisdiction to check its breach or purported breach on the threshold when the complaint came from any interested party involved and it might include co-arbitrators or witnesses not limiting to the litigants of the arbitration proceedings *per se*. (para 10)

[3] The 1st respondent's argument that the applicant had no *locus standi* to seek the prayers was not supported by case laws or jurisprudence. The court was sufficiently empowered to entertain such an application and hear it on merits as breach of natural justice in appropriate cases might render an arbitral award void. (para 10)

[4] The reading of s. 8 AA 2005 does not prohibit the intervention of court *per se* but strictly provides and governs a minimum intervention. When the Act is silent on issues outside the scope of the Act or is not governed by the Act, then the common law powers of the court could not be said to be ousted. The AA 2005 did not remove the inherent jurisdiction of the court. However, the court could not use inherent jurisdiction as a ground to intervene with matters which had been provided for in the Act. The provision was not made for the co-arbitrator to seek such relief as prayed for but it was for the litigants to do so. (para 10)

[5] The 1st respondent argued that s. 14 AA 2005 did not apply to the applicant due to the fact that he was not a party to the arbitration proceedings. However, it was found that there was much merit in the applicant's submission and, thus, he fell within the meaning of s. 2 AA 2005 as the contract between the parties and the arbitrators was bilateral creating rights and obligations for both the arbitrators and the parties. However, where arbitration is administered by arbitral institution, the contractual relationship becomes triangular. (para 10)

[6] It was trite for the arbitrator to assume the status of a quasi-judicial adjudicator with all its inherent duties and obligations. The 1st respondent should have disclosed his past and present appointments to preserve the dignity of his office and to avoid the award from being set-aside pursuant to s. 37(2)(b) AA 2005. The applicant had a legitimate ground to seek the assistance of the court at common law to arrest the mischief at the start as he was a co-arbitrator and after having received remuneration for work, might become personally liable in contract and/or negligence and/or breach of his fiduciary duty for having participated in an award that had a real likelihood to be set-aside pursuant to s. 37(2)(b) AA 2005. (para 10)

[The 1st respondent to disclose all his past and present employment with Virgoz and to pay applicant costs of RM10,000 and costs of RM5,000 to 2nd respondent.]

Case(s) referred to:

Ali Shipping Corporation v. "Shipyard Trogir" [1998] 1 Llyod's Rep 643; Ali Shipping Corp v. Shipyard Trogir [1998] 2 All ER 136 ***(refd)***

Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commerce International Bank Ltd [1981] 3 All ER 577 ***(refd)***

AT & T Corporation & Anor v. Saudi Cable Company [2000] 2 Lloyd's Rep 127 ***(refd)***

AT & T Corporation And Another v. Saudi Cable Co [2000] 2 Lloyd's 127

Boardman v. Phipps 3 All ER 721 ***(refd)***

Cairn Energy India Pty Ltd & Anor v. The Government of India [2010] 2 CLJ 420 CA ***(refd)***

Che Minah Remeli v. Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors [2008] 3 CLJ 653 CA ***(refd)***

Commonwealth Coatings Corp; v. Continental Casualty Co et al 393 US 145 ***(refd)***

Compagnie Europeene De Cereals SA v. Tradax Export SA [1986] QB (Com Ct) 301 ***(refd)***

Coppee-Lavalin v. Ken-Ren [1994] Vol 2 HL 109 ***(refd)***
Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***
Dolling-Baker v. Merrett And Others [1991] 2 All ER 890 ***(refd)***
Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***
Hounslow LBC v. Twickenham GD Ltd [1971] 1 Ch 233 ***(refd)***
K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd [1991] 1 Llyod's Rep 260 ***(refd)***
Karika Ratna Thahir v. PT Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) [1994] 3 SLR ***(refd)***
Kuala Ibai Development Sdn Bhd v. Kumpulan Perunding (1988) Sdn Bhd & Anor [1999] 1 CLJ 632 HC ***(refd)***
Lawlor v. Union of Post Office Workers [1965] Ch 712 ***(refd)***
Lee v. The Showmen's Guild of Great Britain [1952] 2 QB 329 ***(refd)***
Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***
Mohd Latiff Shah Mohd & Ors v. Tengku Abdullah Ibni Sultan Abu Bakar & Ors And Other Cases [1995] 3 CLJ 77 HC ***(refd)***
PPES Resorts Sdn Bhd v. Keruntum Sdn Bhd [1990] 1 CLJ 528; [1990] 2 CLJ (Rep) 649 HC ***(refd)***
R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2) [1999] 1 All ER 577 ***(refd)***
R v. Gough [1993] AC 646 ***(refd)***
Reading v. R [1949] 2 KB 232 ***(refd)***
Russell v. Duke of Norfolk [1949] 1 All ER 109 ***(refd)***
S & M Motor Repairs Pty Ltd And Others v. Caltex Oil (Australia) Pty Ltd and Another [1988] 11 IPR 97 ***(refd)***
Satyendra Kumar v. Hind Constructions Ltd, AIR 1952, Bom 227 ***(refd)***
Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1969] 1 LNS 172 HC ***(refd)***
Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd [2007] 3 SLR 86 ***(refd)***
Steven Szilard v. Szasz [1955] SCR 3 ***(refd)***
Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 2, 8, 14, 37(2)(b)

For the applicant - Celine Chelladurai (Oommen Kurien with her); M/s Zaid Ibrahim & Co
For 1st respondents - Brian Ernest Cumming (YJ Yap with him); M/s Gideon Tan Razali Zaini
For the 2nd respondents - K Shanti Mogan; M/s Shearn Delamore & Co

Reported by Melanie Murthy

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JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the applicant's application in essence to remove a co-arbitrator and/or seek disclosure of his past and present appointments to the arbitral tribunal and to the parties to the arbitration. The prayer in the original form *inter alia* reads as follows:

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(a) that the 1st respondent, Mohamed Abd Majed, declare and/or disclose all his past and present appointments by Virgoz Oils & fats Pte Ltd and its group of companies to the following arbitration proceedings conducted under the auspices of the 2nd respondent, Persatuan Penapis Minyak Sawit Malaysia:

(i) arbitration case no. A330 between Virgoz and Haryana Oils & Soya Ltd; and

(ii) arbitration case no. A331 between Virgoz and Sangrur Agro Ltd;

(b) alternatively, that the 2nd respondent declare and/or disclose the 1st respondent's past and present appointments by Virgoz and the Virgoz Group to parties of arbitration cases nos. A330 and A331;

(c) further, if prayer (1) and/or (2) is allowed, that the 1st respondent is removed and disqualified as the arbitrator of the arbitration cases nos. A330 and A331;

(d) that pending the disposal of these proceedings, arbitration cases nos. A330 and A331 be stayed;

[2] The central issue in this case is whether a co-arbitrator has *locus standi* to seek the above reliefs notwithstanding the fact that such reliefs can be sought by the litigants to the arbitration proceedings.

Brief Facts

[3] The applicant and the 1st respondent are co-arbitrators with one by the name of Lim Guan Leong who was appointed in arbitration cases A330 and 331 where the claimant is Virgoz and the respondents are Haryana Oils & Soya Ltd and Sangrur Agro

Ltd respectively. Both Haryana and Sangrur have refused to participate in the arbitration proceedings. Apart from cases A330 and 331 the 1st respondent and the applicant had been appointed in three other PORAM Arbitrations where Virgoz and/or the Virgoz group were the respondents (3 arbitrations). It must be noted that the 1st respondent in all the above proceedings were appointed by Virgoz and/or their group.

[4] The claimant in the 3 arbitrations had objected to the 1st respondent on the grounds that the 1st respondent had been nominated by Virgoz and/or the Virgoz group in over twenty PORAM Arbitrations and his participation would be perceived as bias. On the basis of the objection the 1st respondent had voluntarily resigned as the co-arbitrator in the 3 arbitration proceedings.

[5] The applicant having come to know the facts and being aware of the fact that Haryana and Sangrur have chosen not to submit to the arbitration proceedings in A330 and A331, has taken upon himself the task to preserve the sacrosanct status of arbitration tribunal to make this application upon: (i) the 1st respondent's refusal of disclosure of all his present and past appointments by the Virgoz group to the parties to cases A330 and A331; (ii) the 2nd respondent's refusal to do the same notwithstanding the 2nd respondent had advised that such disclosure by the 1st respondent will be in order.

[6] The reason the 2nd respondent advances for not making any disclosures from the records is that PORAM Rules and the Arbitration Act 2005 (AA 2005) do not make provision for bodies such as PORAM to make disclosures as to the previous appointment received by arbitrators.

[7] The 1st respondent has raised a number of side issues to oppose the applications. However, the learned counsel for the 1st respondent says that "the real issue should be whether the 1st respondent owes a duty to disclose to another co-arbitrator who already made up his mind that the 1st respondent is partial and biased and the failure to answer to a "hostile and fishing" request amounts to "partiality and biasness".

[8] It must be also noted that the court had suggested at the commencement of the hearing whether the 1st respondent will be minded to disclose as prayed - the answer from the 1st respondent was in the negative.

[9] Parties have relied on the following cases: *Commonwealth Coatings Corp; v. Continental Casualty Co et al* 393 US 145; *Steven Szilard v. Szasz* [1955] SCR 3; *AT & T Corporation & Anor v. Saudi Cable Company* [2000] 2 Lloyd's Rep 127; *R v. Gough* [1993] AC 646; *Che Minah Remeli v. Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 3 CLJ 653; *Dolling-Baker v. Merrett* [1991] 2 All ER 890; *Ali Shipping Corporation v. "Shipyard Trogir"* [1998] 1 Llyod's Rep. 643; *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1; *Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commerce International Bank Ltd* [1981] 3 All ER 577; *Compagnie Europeene De Cereals SA v. Tradax Export SA* [1986] QB (Com Ct) 301; *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; *Coppee-Lavalin v. Ken-Ren* [1994] Vol 2 HL 109; *Cairn Energy India Pty Ltd & Anor v. The Government of India* [2010] 2 CLJ 420; *K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd* [1991] 1 Llyod's Rep 260; *K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd* [1991] 1 Llyod's Rep 524; *Lee v. The Showmen's Guild of Great Britain* [1952] 2 QB 329; *Lawlor v. Union of Post Office Workers* [1965] Ch 712; *Russell v. Duke of Norfolk* [1949] 1 All ER 109; *Hounslow LBC v. Twickenham GD Ltd* [1971] 1 Ch 233; *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1969] 1 LNS 172; *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577; *AT & T Corporation And Another v. Saudi Cable Co* [2000] 2 Lloyd's 127; *Dolling-Baker v. Merrett And Others* [1991] 2 All ER 890; *Ali Shipping Corp v. Shipyard Trogir* [1998] 2 All ER 136; *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86; *S & M Motor Repairs Pty Ltd And Others v. Caltex Oil (Australia) Pty Ltd and Another* [1988] 11 IPR 97; *PPES Resorts Sdn Bhd v. Keruntum Sdn Bhd* [1990] 1 CLJ 528; [1990] 2 CLJ (Rep) 649.

[10] I have read the application, affidavits and submissions of the parties in detail. I am grateful to the submission of the learned counsels who have adequately dealt with the issues. It will serve no useful purpose to repeat the same save as to deal with the core issues. I take the view that the application must be allowed partly. My reasons *inter alia* are as follows:

(a) It is trite that duty of arbitrators to disclose facts likely to be biased is well established jurisprudence in the International arena as well as in Malaysia, and the court has a coercive

power to revoke the authority of an arbitrator. In the instant case if the respondent to the arbitration proceedings namely Haryana and Sangrur had made this application the court will have no hesitation to consider the application as it will fall clearly within the parameters of AA 2005 and case laws. Support for the proposition is found in a number of cases. For example, in *Kuala Ibai Development Sdn Bhd v. Kumpulan Perunding (1988) Sdn Bhd & Anor* [1999] 1 CLJ 632, Nik Hashim J (as he then was) when dealing with Arbitration Act 1952 held that:

> [1] Parties to an arbitration are entitled to expect from an arbitrator complete impartiality and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide. They are also entitled to expect from him a faithful, honest and disinterested decision. Lack of impartiality or bias will be a ground on which objection may be taken against an arbitrator. The arbitrator must not only be free from bias but there must not even be an appearance of bias.
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> [2] An arbitrator must always act judicially with a detached mind and with patience. He must not at any time descend into the arena or take an adversarial role. His response and words used must always be measured and circumspect. He must rule only after hearing the parties. He should always maintain the dignity and impartiality of the appointment.
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> [3] The power of the High Court to give relief for leave to revoke the authority of the arbitrator where an arbitrator is not impartial is provided under s. 25 of the Act. The meaning of the word "impartial" in s. 25(1) of the Act is not restricted to the relationship of the arbitrator to any other parties to the agreement or connection of the arbitrator to the subject referred.
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> [3a] If an arbitrator is not impartial he should be disqualified and it does not matter whether his lack of impartiality arose out of his relationship or connection with one of the parties or the subject referred.
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> [4] An arbitrator can be or perceived to be impartial arising out of his conduct or arising out of his racial prejudice.
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> [5] As to whether an arbitrator is deemed to be biased or not, the 'reasonable suspicion' test and the 'real likelihood' test are both accepted as being the law at

A present. The trend, however, is towards the application of the 'reasonable suspicion' test as in essence the 'reasonable suspicion' test seems to be somewhat broader than the 'real likelihood' test.

B (b) It must be noted that: (i) the requirement of impartiality is a principle of natural justice; (ii) it is a fundamental principle that an arbitrator must remain independent and impartial; (iii) where an arbitral tribunal contains party-nominated arbitrators, the presumption remains that, even if nominated by one of the parties, the arbitrator will be independent and impartial; (iv) a C party-nominated arbitrator is usually appointed in international arbitrations by reason of culture or background, to be broadly sympathetic with the case to be put forward, but who will be strictly impartial when it comes to assessing the facts and evaluating the arguments on fact and law; (v) a party may D nominate an arbitrator who is generally predisposed towards it personally, or as regards to its position in the dispute, provided that the person concerned is at the same time capable of impartial and judicial application to the evidence and arguments submitted by both parties.

E (c) The submission of the applicant that the most important element in the requirement of impartiality and independence is disclosure has merits. Justice Byron White, in the United States Supreme Court case of *Commonwealth Coatings Corp v. Continental Casualty Co (supra)* had this to say:

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> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an G atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions, which he has had or is negotiating with either of the parties.

H (d) I am mindful of the fact that almost all cases that the applicant is relying on do not deal with a challenge taken by a co-arbitrator. In my view the requirement of impartiality is a principle of natural justice, and in consequence the court has an inherent jurisdiction to check its breach or purported breach *in limine* when the complaint comes from any interested I party involved and it may include co-arbitrator or witnesses etc; and is not one limited to the litigants to the arbitration proceedings *per se*. The argument by the learned counsel for the 1st respondent that the applicant has no *locus standi* to

seek the prayers is not supported by case laws or jurisprudence. The court is sufficiently empowered to entertain such an application and hear it on merit as breach of natural justice in appropriate cases may render an arbitral award void. It must also be noted that the courts in India have gone to the extent of saying the doctrine of *uberrima fides* is applicable to arbitrators. [See *Satyendra Kumar v. Hind Constructions Ltd*, AIR 1952, Bom. 227]. I am inclined to say that the jurisprudence relating to fiduciary may be applicable to arbitrators; as ultimately in consideration of a fee they are entrusted to deliver an award. The Lexis Nexis Hong Kong Legal Dictionary defines fiduciary relationship as follows:

> The critical feature of a fiduciary relationship is that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. A fiduciary relationship is a relationship which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person, who is accordingly vulnerable to abuse by the fiduciary of his or her position. The extent of a fiduciary relationship may be restricted by a contract: *Kelly v. Cooper & Anor* [1993] AC 205(PC). The relationship between solicitor and client is fiduciary giving rise to specific legal and professional obligations on the part of the solicitor: *McMaster v. Byrne* [1952] 1 All ER 1362 (PC); *Brown v. IRC* [1965] AC 244 (HL).

Support for similar propositions can be found in a number of cases. To name a few are as follows: (i) *Boardman v. Phipps* 3 All ER 721; (ii) *Mohd Latiff Shah Mohd & Ors v. Tengku Abdullah Ibni Sultan Abu Bakar & Ors & Other Cases* [1995] 3 CLJ 77; (iii) *Karika Ratna Thahir v. PT Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR. In essence the category of persons who may be liable as fiduciary has always been an open subject which falls within the jurisdiction of the courts to decide on the facts. In *Reading v. R* [1949] 2 KB 232 (CA); [1951] AC 507 (HL) at 236, Asquith LJ made the following observations:

> ... there is a well-established class of cases in which he can so recover, whether or not he has suffered any detriment in fact. These are cases in which the servant or agent has realized a secret profit, commission or bribe in the course of his employment; and the amount recoverable is a sum

> equal to such profit. In most of these cases it has been assumed that the plaintiff, in order to succeed, must prove that a "fiduciary relation" existed between himself and the defendant and that the defendant acted in breach of this relation, but the term "fiduciary relation" in this connection is used in a very loose, or, at all events, a very comprehensive, sense. A consideration of the authorities suggests that for the present purpose a "fiduciary relation" exists (a) whenever the plaintiff entrusts to the defendant property tangible or intangible (as, for instance, confidential information) and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorised by him and not otherwise...(b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available ...

[See Lexis Nexis words, phrases and legal maxims]

(e) The learned counsel for the 1st respondent vehemently argues the duty of disclosure is only to the parties involved in the dispute and relies on s. 8 of AA 2005 to say that the jurisdiction for the court to interfere is restricted. The said s. 8 reads as follows:

> Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.

The reading of the said section clearly does not prohibit the intervention of court *per se*. It provides for a minimum intervention as strictly provided by the Act and governed by the Act. When the Act is silent on any issues outside the scope of the Act or is not governed by the Act then the common law powers of the court cannot be said to be ousted. The AA 2005 does not remove the inherent jurisdiction of the court. In my view inherent jurisdiction of the court cannot be a ground to intervene with any matter which has been provided for in the Act. I have dealt with this area of jurisprudence in the case of *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83. I do not wish to repeat the same. In the instant case no provision has been made for co-arbitrators to seek such reliefs as prayed notwithstanding there is provision for the litigant to do so.

(f) In addition the learned counsel for the 1st respondent asserts that the applicant is not a party to arbitration proceedings and in consequence s. 14 of AA 2005 does not apply to the applicant. Section 14 AA 2005 reads as follows:

> (1) A person who is approached in connection with that person's possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence.
>
> (2) An arbitrator shall, without delay, from the time of appointment and throughout the arbitral proceedings, disclose any circumstances referred to in subsection (1) to the parties unless the parties have already been informed of such circumstances by the arbitrator.
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> (3) An arbitrator may be challenged only if:
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> (a) the circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence; or
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> (b) that arbitrator does not possess qualifications agreed to by the parties.
>
> (4) A party may challenge an arbitrator appointed by that party, or in whose appointment that party has participated, only for reasons which that party becomes aware of after the appointment has been made.

And s. 2 of AA 2005 defines party as follows:

> ... means a party to an arbitration agreement or, in any case where an arbitration does not involve all the parties to the arbitration agreement, means a party to the arbitration;

The learned counsel for the applicant say that (i) the applicant should be regarded as a party to the arbitration within the meaning of s. 2 of AA 2005 and assert that a contract exists between the parties and the arbitrators; the aforementioned contract is bi-lateral and creates rights and obligations for both the arbitrators and parties. (ii) However, where arbitration is administered by an arbitral institution, the contractual relationship becomes triangular.

There is much merit in the applicant's submission. Support for the proposition can be found in a number of cases. To name a few are as follows:

(i) In *Compagnie Europeene de Cereals SA v. Tradax Export SA (supra)*, Hobhouse J observed as follows:

> It is the arbitration contract that the arbitrators become parties to by accepting appointments under it. All parties to the arbitration are as a matter of contract (subject always to the various statutory provisions) bound by the terms of the arbitration contract.

(ii) In *K/S Norjarl A/S v. Hyundai Heavy Industries Co Ltd (supra)*, Sir Nicholas Browne-Wilkinson VC had this to say:

> The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract: see *Cie Europeene de Cereals SA v. Tradax Export SA* [1986] 2 Lloyd's Rep 301. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status. Amongst those disabilities is an inability to deal unilaterally with one only of the parties to the arbitration, let alone to bargain with one party alone for a personal benefit.

(g) It is trite that the arbitrator assumes the status of a quasi-judicial adjudicator with all its inherent duties and obligations. On the facts of the instant case I am satisfied that the 1st respondent ought to have disclosed his past and present appointments to preserve the dignity of his office and avoid the award at the end of the day to be set-aside pursuant to s. 37(2)(b) of AA 2005 which reads as follows:

(b) a breach of the rules of natural justice occurred:

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

The applicant has a legitimate ground to seek the assistance of the court at common law to arrest the mischief *in limine* as he is a co-arbitrator and after having received a remuneration for work he may become personally liable in contract and/or

negligence and/or breach of his fiduciary duty for having participated in an award which has a real likelihood of being set-aside pursuant to s. 37(2)(b) of AA 2005.

(h) It is disappointing to note that in this time and era where transparency, accountability and good governance has become a trite jurisprudence in arbitration proceedings to check impartiality and/ or any form of vagaries, the 1st respondent's conduct of non-disclosure and resistance on the facts of the case notwithstanding the 2nd respondent has requested to do so, may place the 1st respondent, a person unfit to decorate the arbitral seat and/or hold any form of quasi-judicial work and/or sit as an arbitrator.

[11] In consequence the appropriate order for this application in the amended form will be that the 1st respondent to disclose as per prayer (1) within seven day failing which he be removed and disqualified as an arbitrator in Arbitration Cases A330 and A331. The 1st respondent to pay the applicant costs in the sum of RM10,000 and the 2nd respondent costs in the sum of RM5,000. The order for costs may be extracted as a separate order upon the payment of allocatur fees. The deputy registrar to issue the certificate relating to allocatur.

I hereby order so.